

Tod Lee Stewart
Stewart & Torgersen, P.A.
1702 E. Highland Avenue, #409
Phoenix, AZ 85016
602-297-9300
tod@1800ourlawyer.com
State Bar Number 018163

Dear Justices,

I have read the proposed change to ER 1.15 submitted by the Arizona Association for Justice and am writing in support of Petition R-12-0032.

The current state of ER 1.15, as written and interpreted:

(a) creates an ethical-equivalent to a prejudgment attachment without any of the statutory or constitutional protections;

(b) puts attorneys in a conflict-riddled position of owing dueling ethical and legal duties to clients and third-parties (which are almost always adverse to one another), e.g., *Hotel Emps. & Rest. Emps. Int'l Union Welfare Fund v. Gentner*, 50 F.3d 719, 721 (9th Cir. 1995) (holding that the imposition of a "dual service" to a client and third party lien claimant violates ethical rules and put attorneys in an "untenable position" of representing dueling interests that are typically adverse); and

(c) makes clients--particularly clients under financial distress--vulnerable to illegitimate claims.

The practical and real-world effect of ER 1.15 is that it freezes client funds, but it does so without any established or preliminary legal process. In fact, the ethical rule is triggered merely by "claim[ed] interests" of third-parties, ER 1.15(e), and is broadly applied to all "matured legal or equitable claims." ER 1.15, Comment No. 4. This results in inexorable application of the rule in virtually every setting since no one knows the true definition of a "matured legal or equitable claim" and the Comment warns against attorneys "unilaterally arbitrating" these matters.

This puts attorneys at odds with their clients, to whom they owe fiduciary duties. The situation is worsened, however, by the Rule and Comment's suggestion that the burden is on these attorneys and their clients to file suit to litigate the existence or scope of alleged third-party claims. The fact is, most injured clients are under financial duress -- after all, tort recoveries only aim to put the victim back to where they were before the tort. This leaves injured clients vulnerable to illegitimate claims against their tort recoveries, often forcing them to make the impossible choice between expensive and time-consuming litigation versus extortive nuisance payments to unscrupulous third-party claimants.

I have read the examples of illegitimate claims in the Petition and those mirror the types of circumstances I now face in my personal injury practice. This is a problem that has increased substantially over the last 5 to 10 years.

The proposed change in R-12-0032 strikes a reasonable and just balance between protecting legitimate third-party claims, ensuring conflict-free representation and protecting the public from improper third-party claimants. It should be adopted in full.

/s/ Tod Lee Stewart